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## The Fourth Problem

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## THE FOURTH PROBLEM

### I. Bennett Capers \*

STEPHEN J. SCHULHOFER, *MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY* (2012). Pp. 216. Hardcover \$21.95.

TRACEY MACLIN, *THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE* (2013). Pp. 416. Hardcover \$89.50.

#### INTRODUCTION

These days, to say there is a problem with the Fourth Amendment, the “most litigated constitutional provision in the nation’s courts,”<sup>1</sup> is to pretty much restate the obvious. Scholars have commented that the Fourth Amendment contains “both the virtue of brevity and the vice of ambiguity;”<sup>2</sup> the “Fourth Amendment today is an embarrassment;”<sup>3</sup> and the “Fourth Amendment case law is a sinking ocean liner—rudderless and badly off course . . . .”<sup>4</sup> There is even my own comment on the matter, which is comparatively mild: “our current Fourth Amendment jurisprudences is flawed.”<sup>5</sup> This is to say nothing of the continuing debate over how to read the two clauses of the Fourth Amendment, the first of which suggests a reasonableness requirement, and the latter of which speaks of the necessity of warrants.<sup>6</sup> I refer to this as a debate, though the proponents advocating reasonableness as the guiding principle are clearly on the ascendancy.<sup>7</sup> So again, the Fourth Amendment is a mess. To make matters worse, recent decisions, which purport to address some of these problems, in fact seem to compound them. Take *United States v. Jones*,<sup>8</sup> which involved the use of a GPS tracking device to monitor a target’s

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1. TRACEY MACLIN, *THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE* xi (2013).

2. JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 42 (1966).

3. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994).

4. *Id.* at 759.

5. I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 12 (2011).

6. As the Court itself has acknowledged, its “jurisprudence [has] lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone.” *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring). For an overview of this debate, see JOSHUA DRESSLER & ALAN C. MICHAELS, *UNDERSTANDING CRIMINAL PROCEDURE*, 157-64 (5th ed., 2010).

7. DRESSLER, *supra* note 6, at 163-64.

8. *United States v. Jones*, 132 S. Ct. 945 (2012).

movement for thirty days. The Court reiterated its view that the Fourth Amendment provides no protection for activities conducted in public, but then reintroduced a ground for violation that scholars had long thought dead—trespass.<sup>9</sup>

What are we to make of this state of affairs? What are we to do about this Fourth Amendment problem? The two books under review address this issue, but do so in decidedly different ways. Stephen Schulhofer's *More Essential Than Ever: The Fourth Amendment in the Twenty-First Century*<sup>10</sup> takes a broad approach. Written for both a lay audience and the student of Fourth Amendment jurisprudence, it tackles a range of Fourth Amendment issues, from the origins of the Fourth Amendment to the challenges we face in balancing Fourth Amendment protections against national security interests.<sup>11</sup> Tracey Maclin's *The Supreme Court and the Fourth Amendment's Exclusionary Rule*,<sup>12</sup> as its title suggests, takes a more focused approach. Relying not just on Supreme Court opinions, but also on archival materials taken from the private papers of retired justices and conference notes, Maclin examines the evolution of the Court's reliance on the exclusionary rule as the primary remedy for a Fourth Amendment violation.<sup>13</sup> Both books are persuasive and insightful. Each in its own way is even challenging. For this "student" of the Fourth Amendment, both books are rewarding. And maddening, too. I review each of them in turn below, beginning with an overview of some of their goals and then offering my own friendly amendments.

#### I. THE ESSENTIAL FOURTH AMENDMENT

I have occasionally wondered what it would be like to begin my Criminal Procedure classes with the story of John Wilkes. After reading Schulhofer's *More Essential Than Ever*, I am wondering again. To be sure, the *Wilkes*<sup>14</sup> case has much to recommend it, but I am thinking about it because Schulhofer, in one of his earliest chapters, tells the story in such a swashbuckling fashion.<sup>15</sup> Consider the following passage in which he describes the events that lead up to the arrest of John Wilkes on seditious libel charges, a case that motivated much of the original thinking behind the drafting and ratification of the Fourth Amendment:

In 1763, no longer willing to tolerate [the anonymous pamphlets denouncing the government's collection of taxes], Lord Halifax, the secretary of state, issued a warrant ordering four king's messengers "to make a strict & diligent search for the Authors, Printers & Publishers of a seditious and treasonable paper entitled, The North Briton Number 45 [and] to apprehend & seize [them], together with their papers." The messengers were indeed diligent. They arrested forty-nine individuals,

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9. *Id.* at 949-50.

10. STEPHEN J. SCHULHOFER, *MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY* (2012).

11. *See generally id.*

12. MACLIN, *supra* note 1.

13. *Id.*

14. *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763).

15. *See* SCHULHOFER, *supra* note 10, at 24-26.

some in their beds, and often on the flimsiest justification. Dryden Leach, a printer, was seized in the middle of the night, together with all his papers, on the basis of nothing more than the fact that one of the messengers “had been told by a gentleman, who had been told by another gentleman, that Leach’s people printed the paper in question.” Eventually, the messengers located the man who had printed *The North Briton*, No. 45, and learned that its author was Wilkes. They proceeded to arrest him, searched all his desk drawers, and seized all of his papers, including even his will.<sup>16</sup>

This is riveting stuff. Reading this, I thought what a terrific movie this would make. Intrigue, suspense, the classic battle between might and right. I quote this passage at length not because the book dwells on the *Wilkes* case—the book devotes a few pages to it—but because it is representative of the book’s readability. Whether he is discussing run of the mill stop-and-frisks, or the Patriot Act’s expansion of federal authority to make delayed notice searches and the resulting miscarriage of justice in the case of Brandon Mayfield, a former military officer suspected of being a terrorist, Schulhofer renders this subject interesting. This, I know, may sound like a movie pitch, but Schulhofer makes the Fourth Amendment come to life.

The book is also quite broad in its scope. After a chapter on the historical background (part of which included the *Wilkes* case) that informed the drafting and ratification of the Fourth Amendment, Schulhofer announces a “jump roughly two hundred years forward”<sup>17</sup> to discuss the contemporary, everyday world of searches and seizures (for example, the knock and announce rule and exigent circumstances exception to the warrant requirement for home searches) and of the policing of public spaces (for example, the use of “consensual encounters” and *Terry* stops).<sup>18</sup> There is a chapter on “special needs” searches (think airport security or the drug testing of government employees), a chapter on wiretapping in the information age, and a chapter devoted to the investigative tools given to the government in response to the September 11th terrorist attacks.<sup>19</sup> The chapters are descriptive, but also critical, pointing out when and how the Court has compromised the Fourth Amendment to serve some other agenda, like strengthening the police in urban environments, and where the Court has conveniently sidestepped the Fourth Amendment’s history.<sup>20</sup> Never pedantic, *More Essential Than Ever* nevertheless wears its politics on its sleeve. This is perhaps most obvious in Schulhoffer’s final chapter, which takes the Court’s originalists to task for their inconsistencies and presses what he terms “adaptive originalism,” a commitment “not to original rules but to original principles.”<sup>21</sup> An example of this would be in the Court’s rejection, in *Tennessee v. Garner*,<sup>22</sup>

16. *Id.* at 25. (internal citations omitted).

17. *Id.* at 42. *See also* *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that police may detain a person whom they reasonably believe was involved in criminal activity—now known as a *Terry* stop).

18. *See* SCHULHOFER, *supra* note 10, at 42-92.

19. *See id.* at 92-180.

20. *Id.*

21. *Id.* at 41, 173-77

22. *Tennessee v. Garner*, 471 U.S. 1 (1985).

of the common-law rule that permitted an officer to use deadly force in pursuing any felon.<sup>23</sup> Unfortunately, *Garner* stands as an outlier in the Court's use of adaptive originalism. Schulhofer writes, "[t]he catch is that adaptation has almost always been a one-way street . . . . [The Court] rarely opts for adaptation when that approach would restrict police discretion."<sup>24</sup>

Still, I found the book maddening in parts. Imagine reading a book on a subject you know well, finding yourself thoroughly immersed in the book, and then suddenly coming across a description of a case and thinking, "Huh?" This happened to me several times. For example, consider his description of the facts in *Terry v. Ohio*,<sup>25</sup> the case in which the Supreme Court gave its imprimatur to the police practice commonly known as stop-and-frisk. Schulhofer writes that:

A Cleveland police officer, on afternoon patrol in the downtown shopping area, noticed a man walking back and forth in front of a store. Suspecting that the man might be "casing a stick-up," the officer confronted him, asked his name, and then quickly spun him around, patted his pockets, and recovered a pistol.<sup>26</sup>

Schulhofer is speaking in shorthand, giving us the Cliff's notes version of what happened in *Terry*, or, in keeping with the earlier movie idea, a Hollywood version of history where several characters are condensed into one. In fact, Detective McFadden (the detective in *Terry*) watched two men, first observing one walk to a store window, pause to look inside, and then proceeding to confer with the second man.<sup>27</sup> Then he observed the second man doing the same.<sup>28</sup> As the opinion puts it, "[t]he two men repeated this ritual alternately between five and six times apiece—in all, roughly a dozen trips."<sup>29</sup> At one point, the two men even conferred with a third man. After ten to twelve minutes of observation, Detective McFadden confronted and frisked all three men, finding a gun on two of them.<sup>30</sup> While my concern about Schulhofer's Cliff's notes version may seem like nitpicking, to me it goes to the heart of what reasonable suspicion must mean. These details make the point that Detective McFadden did not simply stop and frisk the men for being black (a fact that is not mentioned in the *Terry* opinion, though it is hinted at) or because they "didn't look right,"<sup>31</sup> which seems to be the watered down standard that the New York City Police Department has been recently using, and which a federal district court recently found unconstitutional.<sup>32</sup> Rather, Detective McFadden did "good police

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23. 387 U.S. 523 (1967). 24. SCHULHOFER, *supra* note 10, at 53-54 (citing *Garner*, 471 U.S. 1); *id.* at 95-100 (citing *Camara v. Mun. Court of S.F.*, 387 U.S. 523 (1967)).

24. SCHULHOFER, *supra* note 10, at 174.

25. See generally *Terry v. Ohio*, 392 U.S. 1 (1968).

26. SCHULHOFER, *supra* note 10, at 75.

27. *Terry v. Ohio*, 392 U.S. 1, 6 (1968).

28. *Id.* at 5-6.

29. *Id.* at 6.

30. *Id.* at 6-7.

31. *Id.* at 5.

32. *Floyd v. City of New York*, No. 08 Civ. 1034, 2013 WL 4046209, at \*1 (S.D.N.Y. Aug. 12, 2013) (finding New York City's stop and frisk practices violated the Fourth Amendment). See Hon. Louis Stokes,

work.”<sup>33</sup> This difference matters.<sup>34</sup>

Or at least this difference mattered to me, but perhaps that is because I have spent so much time thinking about *Terry* and its progeny in particular. In fact, the time I have spent writing and teaching about the Fourth Amendment may explain why I found myself wanting more in other sections of the book, too. As an example of the Court’s “strong commitment to the traditional requirement of prior judicial approval for intrusions into the home,” and of the Court remaining “faithful to our original Fourth Amendment tradition when the privacy of a domicile is at stake,”<sup>35</sup> Schulhofer discusses the case *Minnesota v. Olsen*, in which the Court held an arrest warrant was necessary to arrest an overnight guest in a third party’s home.<sup>36</sup> But this discussion seemed incomplete without some mention of *New York v. Harris*,<sup>37</sup> which basically says, “ah, yes, there should have been a warrant, but the arrest is still good.” Or consider his discussion of the much-maligned third-party doctrine,<sup>38</sup> which essentially holds that a person cannot have a reasonable expectation of privacy with information she shares with a third party. Schulhofer makes the argument that “Fourth Amendment safeguards should apply whenever individuals convey personal information to a service provider or other intermediate institution under promise of confidentiality.”<sup>39</sup> I completely agree. But still, I wanted Schulhofer to discuss how his solution would address a related doctrine, that of “false friends,”<sup>40</sup> which, aside from being problematic in its own right, would seem to conflict

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*Representing John W. Terry*, 72 ST. JOHN’S L. REV. 727, 729 (1998). For an argument tracing the Court’s insensitivity to racial targeting to the Court’s tactical decision to minimize the issue of race in *Terry*, see Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

33. This is a point I make in a recent New York Times op-ed. See I. Bennett Capers, *Moving Beyond Stop-and-Frisk*, N.Y. TIMES, Aug. 12, 2013, [http://www.nytimes.com/2013/08/13/opinion/moving-beyond-stop-and-frisk.html?\\_r=0](http://www.nytimes.com/2013/08/13/opinion/moving-beyond-stop-and-frisk.html?_r=0).

34. Another place where this irked me was in Schulhofer’s description of *Whren v. United States*, in which the Court green-lighted the practice of pretextual police stops. 517 U.S. 806 (1996). Schulhofer writes that the police pulled Whren over for making a turn without signaling, and then arrested him for that offense. *Id.* at 808. The search-incident to arrest authority then permitted the police to search the area within his reach, which turned up two plastic bags of cocaine. SCHULHOFER, *supra* note 10, at 61. The Court opinion, however, describes the facts very differently. After Whren committed a traffic violation, two police officers signaled Whren to pull over. *Whren*, 517 U.S. at 808. One of the officers then approached the driver’s window, and “immediately observed two large plastic bags of what appeared to be crack cocaine in petitioner Whren’s hands.” *Id.* at 808-09. Again, the facts matter, if for no other reason than they suggest the improbability of the officers’ version of the events and the likelihood that they in fact engaged in “testilying.” It is worth noting that both officers have been the subject of misconduct allegations, including allegations of planting evidence and providing false testimony. See generally Kevin R. Johnson, *The Song Remains the Same: The Story of Whren v. United States*, in RACE LAW STORIES (Rachel F. Moran & Devon Wayne Carbado eds., 2008); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998). On the origins of the term “testilying” and its pervasiveness, see I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835 (2008).

35. SCHULHOFER, *supra* note 10, at 50.

36. *Id.* (discussing *Minnesota v. Olsen*, 495 U.S. 91 (1990)).

37. *New York v. Harris*, 495 U.S. 14 (1990).

38. SCHULHOFER, *supra* note 10, at 126-34.

39. *Id.* at 134.

40. The “false friends” doctrine is traceable to *Hoffa v. United States*, 385 U.S. 293 (1967) and *United States v. White*, 401 U.S. 745 (1971). The doctrine stands for the proposition that, when a person enters into a conversation, he assumes the risk that the listener may report the conversation to a police officer, or that the listener may record the conversation. As such, there can be no legitimate expectation of privacy in conversations with others. The doctrine is interesting because it seems, on its face, inconsistent with the Court’s holding in *Katz v. United States*, 389 U.S. 347 (1967), in which the Court held that one does have a reasonable expecta-

with his solution.<sup>41</sup> And when Schulhofer asserts, during his discussion of eavesdropping in the information age, that the “major aim of the Fourth Amendment—unquestionably—is . . . to afford shelter to political, religious, and ideological minorities,”<sup>42</sup> I again want more. The Framers, after all, were insiders, not outsiders, and their interests seemed more aligned with this than anything else. After all, going back to the man who “inspired” the Fourth Amendment, John Wilkes, one senses that he represented the silent majority, not an ideological minority.<sup>43</sup> And how exactly does this claimed notion of protecting “political, religious, and ideological minorities” square with the rather majoritarian-sounding requirement that the Fourth Amendment only applies where there is an expectation of privacy “that society is prepared to recognize as reasonable”?<sup>44</sup>

## II. THE WANING EXCLUSIONARY RULE

While Schulhofer’s *More Essential Than Ever* provides the big picture, Maclin’s *The Supreme Court and the Exclusionary Rule* zooms in to focus exclusively on exclusion as a Fourth Amendment remedy.<sup>45</sup> Every student of criminal procedure, and hopefully every criminal litigator, is familiar with *Mapp v. Ohio*,<sup>46</sup> the case that ushered in the Warren Court’s criminal procedure revolution and made the exclusionary rule binding on the states. In short, the “rule” is that if the police obtain evidence in violation of a defendant’s Fourth Amendment right to be free from unreasonable searches or seizures, the primary remedy is that the evidence will be excluded at trial.<sup>47</sup> Similarly, students of criminal procedure and criminal litigators are familiar with *United States v. Leon*,<sup>48</sup> in which the Court embraced a “good faith” exception to the exclusionary rule: evidence obtained by police acting in good faith reliance on a search warrant issued by a judge, but later determined to be unsupported by probable cause, will not be excluded. Also familiar to many is the Supreme Court’s latest major extension of the good faith exception in *Herring v. United States*.<sup>49</sup> Now, even evidence resulting from police reliance on negligent—even incompetent—actions taken by police departments themselves will not warrant exclusion, so long as the initial reliance was in good faith.

While these seminal cases are familiar to many, the build up to them is not.

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tion of privacy in conversations intended to be private where there is no “invited ear” that subsequently reports the conversation. As Stephen Saltzburg and Dan Capra rhetorically put it, “[w]hy does a person assume the risk that a friend will record an incriminating conversation, but not the risk that the government will use a wiretap and record an incriminating conversation?” STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY* 475 (7th ed. 2004). The inconsistency becomes more glaring when one considers Title III requirements, as I do in an earlier article. See I. Bennett Capers, *Crime, Surveillance, and Communities*, 15 FORDHAM URB. L.J. 959, 971-74 (2013).

41. See Capers, *supra* note 40, at 971-74.

42. SCHULHOFER, *supra* note 10, at 141.

43. See generally *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763).

44. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (emphasis added).

45. Returning to the earlier movie comparison, if *More Essential Than Ever* is like a big Hollywood historical blockbuster—think *Lincoln*—then *The Supreme Court and the Fourth Amendment’s Exclusionary Rule* is more like an eight-part PBS documentary. See SCHULHOFER, *supra* note 10; LINCOLN (DreamWorks 2012); MACLIN, *supra* note 1.

46. See generally *Mapp v. Ohio*, 367 U.S. 643 (1961).

47. *Id.*

48. See generally *United States v. Leon*, 468 U.S. 897 (1984).

49. See generally *Herring v. United States*, 555 U.S. 135 (2009).

Maclin's book, in wonderful detail and heavily footnoted, completes the picture of these cases, as well as the many cases that preceded and informed them.<sup>50</sup> As Maclin notes in his Introduction, Court opinions "often do not reveal the 'motivations' behind the results announced by the Court."<sup>51</sup> To get at these motivations, Maclin plumbs the private papers of retired Justices, the briefs filed by lawyers, the conference notes of the Justices, earlier drafts of published opinions, as well as law clerk memos. For the reader who wants a play-by-play examination of the rise and fall of the exclusionary rule and the behind the scenes machinations along the way, this is a terrific book.

Maclin begins with *Boyd v. United States* and *Weeks v. United States*, the two early cases that established the foundations of the exclusionary rule, at least in federal prosecutions.<sup>52</sup> He follows with a chapter titled "The Influence of Felix Frankfurter", which has as its centerpiece the Court's decision in *Wolf v. Colorado*, in which the Court declined to make the exclusionary rule binding on the states.<sup>53</sup> Although this part of *Wolf* was eventually overruled by *Mapp v. Ohio*, Maclin joins other scholars in noting that *Wolf* remains significant in important respects.<sup>54</sup> One, *Wolf* injects deterrence as the primary rationale for the exclusionary rule.<sup>55</sup> Two, *Wolf* marks the first occasion where the Court uncoupled the exclusionary rule from the Fourth Amendment.<sup>56</sup> And perhaps more importantly, by uncoupling the exclusionary rule from the Fourth Amendment, *Wolf* "showed future justices how to restrict the exclusionary rule without appearing to abolish the rule itself [and] 'planted the seeds of destruction for the exclusionary rule—in federal as well as state cases.'"<sup>57</sup> In short, if the exclusionary rule is now a "last resort, not our first impulse,"<sup>58</sup> as the current Court claims, it is in part because of *Wolf*'s language.

Maclin's description of the evolution of the exclusionary rule becomes more interesting when he gets to the Warren Court and *Mapp v. Ohio*.<sup>59</sup> As Maclin does throughout the book, he sets the stage with a few facts of the case, but these facts are quickly followed by the real action: the background strategizing and horse-trading of the justices, the tense conference discussions, the circulated draft opinions and edits, and compromises to win votes.<sup>60</sup> Maclin persuasively shows how the compromises in *Mapp* set its own stage, in this case for its demise. For example, Justice Clark's opinion speaks of the ex-

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50. See generally MACLIN, *supra* note 1.

51. *Id.* at xiv.

52. See generally *Weeks v. United States*, 232 U.S. 383 (1914); *Boyd v. United States*, 116 U.S. 616 (1886).

53. See generally *Wolf v. Colorado*, 338 U.S. 25 (1949); MACLIN, *supra* note 1, at 29.

54. See generally *Mapp v. Ohio*, 367 U.S. 643 (1961); MACLIN, *supra* note 1.

55. *Wolf*, 338 U.S. at 31.

56. MACLIN, *supra* note 1, at 30. For example, this uncoupling was taken up in *Leon v. United States*, which stated: "Whether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *Leon v. United States*, 468 U.S. 897, 906 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 223 (1983)).

57. MACLIN, *supra* note 1, at 30-31 (quoting Yale Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 616 (1983)).

58. *Herring v. United States*, 555 U.S. 135, 140 (2009) (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)).

59. See generally *Mapp*, 367 U.S. 643.

60. See generally MACLIN, *supra* note 1.



clusionary rule being “judicially implied” and a “deterrent safeguard,” language that was inserted late in the drafting process.<sup>61</sup> As Maclin puts it, by relying on deterrence to justify exclusion, “Clark constructed the exclusionary rule’s eventual demise.”<sup>62</sup> Later, Maclin is even more blunt: “the Burger and Rehnquist Courts would use [Clark’s] description on the purpose of the rule as a bludgeon to destroy the constitutional foundation of *Mapp*.”<sup>63</sup>

Both Burger and Rehnquist vehemently opposed the exclusionary rule,<sup>64</sup> and were crucial in weakening its reach. Although the Court had read the exclusionary rule as extending to all fruits of the violation—in short, the fruit-of-the-poisonous tree exclusion—we see the build up to the attenuation exception in *Wong Sun v. United States*,<sup>65</sup> which rejected the “but-for” test for exclusion and instead permitted the admission at trial of fruits of a Fourth Amendment violation, so long as the evidence was obtained “by means sufficiently distinguishable to be purged of the primary taint.”<sup>66</sup> We see the early attempts to adopt a good-faith exception to the exclusionary rule in cases such as *Illinois v. Gates*, which was eventually decided on other grounds, and then its successful adoption in *United States v. Leon*, with language both narrow and broad.<sup>67</sup> And we see the embrace of the “independent source” and “inevitable discovery” exceptions to the exclusionary rule as well.<sup>68</sup> Lastly, in a chapter titled “The Rehnquist and Roberts Courts: Making the Exclusionary Rule Largely Irrelevant”, Maclin takes us through the more recent assaults on exclusion through cases such as *New York v. Harris* (essentially green-lighting warrantless arrests in the home), *Hudson v. Michigan* (essentially green-lighting the practice of ignoring the knock-and-announce requirement), and perhaps most assaultive of all, *Herring v. United States*, which, as Maclin observes, reflects the Roberts Court’s intention to “either abolish the [exclusionary] rule or confine it to cases of egregious Fourth Amendment violations.”<sup>69</sup>

Nor is the book limited to the exclusionary rule. Indeed, some of the strongest parts

61. *Mapp*, 367 U.S. at 648 (quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)); MACLIN, *supra* note 1, at 97.

62. MACLIN, *supra* note 1, at 98.

63. *Id.* at 99.

64. Burger, at one point, claimed he only wanted to “trim” the exclusionary rule. *Id.* at 286. However, he did more than trim it, and repeatedly criticized the rule, in one speech even complaining that, “[w]e afford the accused more procedural protections, such as the exclusion and suppression of evidence and the dismissal of cases for irregularities in the arrests and searches, than under any other system.” Warren E. Burger, *Paradoxes in the Administration of Criminal Justice*, 58 J. CRIM. L. & CRIMINOLOGY 428, 429 (1967). For his part, Rehnquist wrote in one memo, “[w]hatever may be the arguments for and against this particular limitation on the Exclusionary Rule, my disagreement with *Mapp v. Ohio* remains so fundamental that I will seize any opportunity to limit the damage done by that case.” MACLIN, *supra* note 1, at 267 (internal citations omitted).

65. *Wong Sun v. United States*, 371 U.S. 471 (1963).

66. *Id.* at 488.

67. See generally *Illinois v. Gates*, 462 U.S. 213 (1983); *United States v. Leon*, 468 U.S. 897 (1984). Although on its face, *Leon* was limited to cases involving police reliance on judicial warrants later declared to be ineffective, its language is in part broad enough to encompass other “good faith” mistakes.

68. See generally *Leon*, 468 U.S. at 897.

69. See generally *Hudson v. Michigan*, 547 U.S. 586 (2006); *New York v. Harris*, 495 U.S. 14 (1990). See also *Herring v. United States*, 555 U.S. 135, 144 (2009) (holding that to “trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.” The Court concluded that an officer’s arrest of Herring, based on arrest warrant that another police employee had failed to vacate, did not rise to such a level); MACLIN, *supra* note 1, at 336.

of the book involved inconsistency in the Justices' insistence on limiting the exclusionary rule to instances where it can deter egregious police misconduct (though proving deterrence is notoriously difficult),<sup>70</sup> and their narrow views about Fourth Amendment standing.<sup>71</sup> Because the Court deems Fourth Amendment violations personal—only a person who has a reasonable expectation of privacy can claim his rights were violated<sup>72</sup>—it is now perfectly fine for the Government to deliberately violate the rights of one individual to secure evidence to use against another.<sup>73</sup> This is in fact what happened in *United States v. Payner*,<sup>74</sup> where the Internal Revenue Service (“IRS”), without a warrant, broke into the briefcase of a target’s lawyer to uncover information that led to Payner, who was subsequently convicted. The Court’s concern with deterrence was suddenly irrelevant. The IRS may have acted in bad faith and may even have acted egregiously, but since it did not violate Payner’s reasonable expectation of privacy, the remedy of exclusion was inapplicable.<sup>75</sup>

Of course, this overview only begins to give a sense of the breadth and encyclopedic detail of the book. The book examines not just the seminal exclusionary cases, but the minor ones as well. It also describes the fits, starts, and the near misses. An example of this can be found in the chapter on the “good faith” exception.<sup>76</sup> The chapter ends with a discussion of *New Jersey v. T.L.O.*, and the issue that initially concerned the Justices: whether the exclusionary rule should apply in a juvenile delinquency proceeding to bar evidence acquired by a school official.<sup>77</sup> Maclin uses several pages to take the reader through the oral argument, through the conference discussion, through the draft opinions, and through a second conference and a second re-argument.<sup>78</sup> Ultimately, of course, the Court decided not to address the issue of exclusion, focusing instead on whether the school official’s search was reasonable within the meaning of the Fourth Amendment.

It is this level of detail which makes the book so rewarding, and at the same time maddening. Although Maclin’s point of view is made clear throughout the book, he is almost too methodological in his delivery. I could not help but wonder throughout how much more impactful the book might be if he had begun with, say, *Herring*, the most recent and potentially far-reaching blow to the exclusionary rule, and then jumped back to the beginning. I wondered, too, if in the discussion of every major case, we did not have to go through the same routine: bare-boned facts, then a recitation of each Justice’s statement at the conference discussion, then the arguments over the draft opinions. For me, neither a professional nor amateur historian, it was sometimes too much information, or at least too methodically delivered.

Maddening, too, was the absence of Maclin’s own thoughts on how to revive the

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70. Among other things, deterrence is nearly impossible to prove empirically.

71. See generally MACLIN, *supra* note 1, at 35-36, 217-25, 229-30.

72. See generally *Rakas v. Illinois*, 439 U.S. 128 (1978).

73. The first individual may have a civil remedy. However, what matters is that the second individual—the target of the investigation—will not have any remedy, civil or exclusion, at all.

74. See *United States v. Payner*, 447 U.S. 727 (1980).

75. *Id.*

76. See generally MACLIN, *supra* note 1, at 231.

77. See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); MACLIN, *supra* note 1, at 266.

78. See MACLIN, *supra* note 1, at 264-73.

exclusionary rule, or for that matter how to revive and/or strengthen some other remedy such as the civil penalties that were available to John Wilkes. *The Supreme Court and the Fourth Amendment's Exclusionary Rule* is remarkable in its detail and in showing us where we have been, where we are, and where we seem to be heading. However, there is very little by way of a roadmap suggesting an alternative course. I found myself wishing for a type of long-term planning and strategizing on par with the planning by conservatives to neutralize the exclusionary rule. Speaking more broadly, I could say the same thing about Schulhofer's *More Essential Than Ever*. We know the Fourth Amendment is a mess. But how, specifically, do we fix it?

#### CONCLUSION

My review of *More Essential Than Ever* and *The Supreme Court and the Fourth Amendment's Exclusionary Rule* has been critical, but let me be absolutely clear: these are both terrific books. They are both well written and informative, and I wish I could sing their praises more. In short, though I have leveled some criticisms, these criticisms are minor compared to the books' strengths. And here is the important thing: the individual who reads them will find them enriching. This reader was enriched by both.